

Mental Health Amendment Bill 2016

Explanatory Notes

FOR

Amendments To Be Moved During Consideration In Detail By The Honourable Cameron Dick MP, Minister for Health and Minister for Ambulance Services

Title of the Bill

Mental Health Amendment Bill 2016

Objectives of the Amendments

The Mental Health Review Tribunal (the Tribunal) is an independent statutory body established under section 436 of the *Mental Health Act 2000* (the MHA 2000). The primary purpose of the Tribunal is to carry out reviews of involuntary patients and hear applications to administer or perform particular treatments.

Tribunal members are appointed by the Governor in Council pursuant to section 440 of the MHA 2000. Section 440(3) provides that a person is eligible for an appointment as the president of the Tribunal only if the person is a lawyer of at least seven years standing. Section 440(4) provides that a person is eligible for appointment as a member of the Tribunal only if the person:

- (a) is a lawyer of at least five years standing; or
- (b) is a psychiatrist; or
- (c) has other qualifications and experience the Minister considers relevant to exercising the Tribunal's jurisdiction.

The term 'lawyer' is not defined in the MHA 2000, but is defined in the *Acts Interpretation Act 1954* as an Australian lawyer within the meaning of the *Legal Profession Act 2007* (the Legal Profession Act). The Legal Profession Act defines the term 'Australian lawyer' to mean a person who is admitted to the legal profession under the Legal Profession Act or a corresponding law. 'Admission to the legal profession' is defined to mean admission by a Supreme Court as a lawyer, legal practitioner, barrister, solicitor, barrister and solicitor, or solicitor and barrister, under the Legal Profession Act, a previous Act or a corresponding law.

Therefore the lawyer member of the Tribunal must be a person who has been admitted to the legal profession for a minimum of five years. The meaning of ‘lawyer’ under the MHA 2000 excludes the possibility that a person could be eligible for appointment as a lawyer merely as a result of obtaining a law degree.

In late 2016, it was identified that one of the persons appointed to the Tribunal as a lawyer member pursuant to section 440(4)(a) is not, and has never been, a ‘lawyer’ within the meaning of section 440 of the Act. While that person holds a Bachelor of Laws qualification, they have never been admitted to the legal profession. Therefore, the person was ineligible to be appointed to the Tribunal as a lawyer member and it follows that their appointment and subsequent reappointments are invalid.

The Government is satisfied that legislation is required to explicitly and retrospectively validate the person’s appointment and relevant decisions of the Tribunal, to provide certainty as to the legal effect of those decisions, and to provide protection to those who have relied or acted upon those decisions in good faith.

The MHA 2000 will be repealed and replaced by a new legislative framework under the *Mental Health Act 2016* (the MHA 2016) on 5 March 2017. The Tribunal will continue under the MHA 2016. The Government is satisfied that the appointment validation and right of review provisions are not transitional in nature, and the commencement of the MHA 2016 does not affect the Parliament’s power to enact those provisions either before or after 5 March 2017. The Government is also satisfied that the provisions can be located in the MHA 2016.

Achievement of the Objectives

The Mental Health Amendment Bill 2016 amends the MHA 2016 prior to its commencement. It is therefore appropriate to progress the validation provisions as amendments to the Bill. Specifically, the amendments to the Bill will:

- explicitly, and retrospectively, validate the appointment and reappointment of the ineligible lawyer member of the Tribunal and any relevant decisions of the Tribunal or anything otherwise done by the member under the Act; and
- provide a right of review for decisions that may have been affected in a material way because of the invalid appointment.

Alternative Ways of Achieving Policy Objectives

There are no alternative ways to achieve the policy objectives of these amendments.

Estimated Cost for Government Implementation

Costs associated with implementing the amendments will be met from within the existing health portfolio budget allocation.

Consistency with Fundamental Legislative Principles

The amendments raise potential breaches of fundamental legislative principles with regards to whether the legislation has sufficient regard to the rights and liberties of individuals.

Retrospective validation

New section 800B, inserted by amendment 2, retrospectively validates the appointment of a lawyer member.

Section 4(3)(g) of the *Legislative Standards Act 1992* specifically provides that legislation should not adversely affect rights and liberties of individuals, or impose obligations, retrospectively. This fundamental legislative principle reflects the presumption at common law that, unless the contrary intention appears, it is Parliament's intention that legislation operates prospectively and not retrospectively.

The presumption against retrospectivity does not limit Parliament's power to legislate retrospectively. The presumption can be displaced if the legislation expressly states that the provisions are to apply retrospectively, and it is further displaced if the legislation is characterised as validating to overcome an invalidity arising under a pre-existing law.

The former Scrutiny of Legislation Parliamentary Committee did not endorse the practice of retrospectively validating legislation where it had potential to adversely affect rights and liberties. However, there is a need to retrospectively validate the decisions of the Tribunal in cases where it has been improperly constituted by the inclusion of the ineligible lawyer member, to provide certainty as to the legal effect of the decisions of the Tribunal and to provide protection to those who in good faith have relied or acted upon those decisions.

In recognition of the potential for retrospective validation to infringe upon the rights of patients, consideration has been given to whether additional measures to safeguard against any miscarriage of justice or significant prejudice should be adopted in addition to validating the Tribunal decisions. It is therefore proposed that a right of review be included in the legislation, to enable particular decisions to be reviewed upon application.

Consultation

Due to the urgency and nature of the amendments, no public consultation has been undertaken.

Consistency with legislation of other jurisdictions

The amendments are specific to the State of Queensland.

NOTES ON PROVISIONS

Amendment 1

Amendment 1 inserts new clause 1A into the Bill, to provide for the commencement of the amendments. It is intended that the validation and definitions provisions of new Chapter 18A will commence on assent, and be immediately integrated into the MHA 2016, while the remaining provisions relating to the statutory right of review will commence by Proclamation.

Amendment 2

Amendment 2 inserts new clause 50A into the Bill, which inserts new Chapter 18A into the MHA 2016. Chapter 18A, which comprises new sections 800A to 800G, provides for the validation of the ineligible person's appointment to the Tribunal under the repealed Act, and the referral of particular decisions affected by the validation of that appointment to a Special Tribunal.

New section 800A provides definitions for the following terms used in new Chapter 18A: *relevant decision*, *repealed Act*, and *special tribunal*.

New section 800B validates the initial appointment and subsequent reappointments of the person purportedly appointed and reappointed to the Tribunal on the basis that the person was eligible for appointment under section 440(4)(a) of the MHA 2000 ('the ineligible person').

The validation has the effect that anything done or omitted to be done by the ineligible person during the period 28 February 2002 and ending on 31 August 2016, that would have been valid and lawful had the person been validly appointed as a member, is taken to be, and always to have been, valid and lawful as if the person had been validly appointed for the relevant period. Therefore, any decisions made by the Tribunal when constituted by members that included the ineligible person, are taken to be valid. This provides certainty as to the legal effect of the decisions of the Tribunal and to provide protection to those who in good faith have relied or acted upon those decisions.

New sections 800C to 800F provide an additional right of review for decisions made by the Tribunal under the MHA 2000, but only if the Tribunal was constituted by members that included the ineligible person (referred to as 'a relevant decision'). The right of review will mitigate a potential miscarriage of justice or significant prejudice that may arise as a result of retrospectively validating a relevant decision.

New section 800C provides for the constitution of the Special Tribunal, when considering a referral of a relevant decision from the chief executive. The requirements for the constitution of the Special Tribunal are consistent with the way in which the Tribunal must be constituted under the MHA 2000 and the MHA 2016 for most decisions.

New section 800D provides that, within six months after the commencement of this section, a person may ask the chief executive to refer a relevant decision to the Special Tribunal.

The application may be made by:

- the person who is or was the subject of the decision, or an interested person (currently defined in the MHA 2016 to be either the person's nominated support person or another individual who has a sufficient interest in the person); or
- an applicant in a proceeding, if the relevant decision was made in a proceeding about a forensic information order under the MHA 2000.

New section 800E provides that the chief executive may refer the relevant decision to the Special Tribunal if he or she considers the decision is likely to have been affected in a material way because, when the decision was made, the Tribunal was constituted by members that included the ineligible person. The chief executive's consideration is focused on process, rather than a clinical assessment.

New section 800F applies if the chief executive has referred a relevant decision under new section 800E and outlines the types of decisions the Special Tribunal may make after considering a relevant decision. The Special Tribunal must be satisfied that the relevant decision is likely to have been affected in a material way because, when the decision was made, the Tribunal was constituted by members that included the ineligible person.

If the relevant decision is still in force, the Special Tribunal may refer the matter back to the Tribunal for a new decision. The Special Tribunal may also, or instead, make a recommendation to the chief executive about the relevant decision that the Special Tribunal considers appropriate. The Tribunal will also be able to make a recommendation to the chief executive where the relevant decision is no longer in force. If a relevant decision is still in force and an appeal against the relevant decision has been started, the Special Tribunal will defer consideration of the matter until the appeal is decided or withdrawn.

New section 800G provides for the Tribunal to hear and decide a matter that has been referred to it by the Special Tribunal. The Tribunal must hear and decide the matter by way of a fresh hearing on the merits, and must set aside the relevant decision and substitute a new decision. The hearing will be conducted under the MHA 2000 as if it had not been repealed.

To remove any doubt, the new decision made by the Tribunal may be consistent with the relevant decision. The new decision is also deemed to be the final decision for the proceeding, and is taken to have been made on the same day as the relevant decision. This will ensure that the decision is then captured by the transitional provisions in Chapter 20 of the MHA 2016. The appeal provisions under Chapter 8 of the MHA 2000 will apply to the new decision, from the day the new decision is made, as if the MHA 2000 had not been repealed. This ensures appeal rights for the new decision are re-established.

Amendment 3

Amendment 3 amends clause 51 of the Bill, to amend Schedule 3 (Dictionary) of the MHA 2016 to insert definitions for *relevant decision*, *repealed Act*, and *special tribunal*.